MOTION FILED
MAR 7 - 2005

(3)

No. 04-1056

In the Supreme Court of the United States

EMC MORTGAGE CORPORATION,

Petitioner,

v.

STANLEY WILLIAM STARK and PATRICIA GARNET STARK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE AMERICAN FINANCIAL SERVICES ASSOCIATION, THE CONSUMER MORTGAGE COALITION, AND THE FINANCIAL SERVICES ROUNDTABLE'S HOUSING POLICY COUNCIL FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ROBIN S. CONRAD
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

EVAN M. TAGER
DAVID M. GOSSETT
Counsel of Record
ARCHIS A. PARASHARAMI
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for the Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2(b), the Chamber of Commerce of the United States, the American Financial Services Association, the Consumer Mortgage Coalition, and the Financial Services Roundtable's Housing Policy Council respectfully move for leave to submit the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari filed by petitioner EMC Mortgage Corporation. Consent to the filing of this *amicus* brief was granted by counsel for petitioner but was denied by counsel for respondents.

The Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of all sizes. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases that have raised issues of vital concern to the nation's business community. In particular, the Chamber has been involved in a wide variety of cases involving the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-15, and has repeatedly appeared as an *amicus* in this Court in such cases—most recently in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), and *PacifiCare Health Systems, Inc.* v. *Book*, 538 U.S. 401 (2003). The Chamber was one of a number of groups that filed a joint *amicus* brief in the Eighth Circuit in this case, urging that court to grant rehearing.

The American Financial Services Association ("AFSA") is the national trade association for market-funded providers of financial services to consumers and small businesses.

AFSA's membership includes over 500 diversified financial-services companies that offer an array of financial services, including personal, automobile, and home-equity loans and credit cards. AFSA joined the *amicus* brief in the Eighth Circuit in this case.

The Consumer Mortgage Coalition ("CMC") is a trade association of national mortgage lenders, mortgage servicers, and mortgage origination-service providers, committed to the nationwide rationalization of consumer mortgage laws and regulations. CMC, too, joined the *amicus* brief in the court below.

The Housing Policy Council ("HPC") is an operating division of the Financial Services Roundtable, whose membership originates well over half of the residential mortgages in the United States. It represents its membership in all matters relating to home mortgages in regulatory, legislative, and judicial fora, and also joined the *amicus* brief in the court below.

Many of the members, constituent organizations, and affiliates of the *amici* have adopted as standard features of their business contracts provisions that in appropriate circumstances mandate the arbitration of disputes arising from or relating to those contracts. They use arbitration because it is a prompt, fair, inexpensive, and effective method of resolving disputes with consumers and other contracting parties. By adopting an entirely implausible interpretation of an arbitration agreement and then refusing to review a massive award of punitive damages for consistency with due process, the Eighth Circuit's decision significantly undermines the benefits of arbitration. Were that decision to stand, it could easily prove to be a poison pill that causes the *amici*'s members to give up on arbitration altogether. Because such an outcome is in no one's interest and flies directly in the face of the policies animating the FAA, *amici* have a strong interest in the issues presented in the petition. *Amici* believe that their par-

ticipation will assist the Court in its resolution of the issues presented in this case.

For the reasons stated above, the Chamber, AFSA, CMC, and HPC respectfully request that the Court grant their motion for leave to file this brief.

Respectfully submitted.

ROBIN S. CONRAD
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

EVAN M. TAGER
DAVID M. GOSSETT
Counsel of Record
ARCHIS A. PARASHARAMI
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for the Amici Curiae

MARCH 2005

TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI I

TABLE OF AUTHORITIES V

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 4

THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER COURTS MUST ENSURE THAT ANY AWARD OF PUNITIVE DAMAGES BY AN ARBITRATOR COMPORTS WITH DUE PROCESS. 4

A. Federal Policy Encourages Contracting Parties To Agree To Mandatory Arbitration Clauses 4

B. The Decision Below Is Effectively A Poison Pill That Will Lead Contracting Parties Not To Include Arbitration Clauses In Their Contracts In The Future 8

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

Cases

Allied-Bruce Terminix Cos. v. *Dobson*,
513 U.S. 265 (1995) 4, 5

Armendariz v. *Foundation Health PsychCare Servs., Inc.*, 24 Cal. 4th 83 (2000) 13

BMW of N. Am., Inc. v. *Gore*,
517 U.S. 559 (1996) 3

Baravati v. *Josephthal, Lyon & Ross, Inc.*,
28 F.3d 704 (7th Cir. 1994) 11

Birmingham News Co. v. *Horn*, __ So.2d __, 2004 WL 1293993 (Ala. June 11, 2004) 11

Bowen v. *Amoco Pipeline Co.*,
254 F.3d 925 (10th Cir. 2001) 12

Chapman v. *Houston Welfare Rights Org.*,
441 U.S. 600 (1979) 7, 8

Cole v. *Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997) 11

Cooper Indus., Inc. v. *Leatherman Tool Group, Inc.*,
532 U.S. 424 (2001) 9

Davis v. *Prudential Sec., Inc.*, 59 F.3d 1186 (11th Cir. 1995) 11, 12

Doctor's Assocs., Inc. v. *Casarotto*,
517 U.S. 681 (1996) 7

EEOC v. *Waffle House, Inc.*,
534 U.S. 279 (2002) 3, 7

Gilmer v. *Interstate/Johnson Lane Corp.*,
500 U.S. 20 (1991) 9

TABLE OF AUTHORITIES – continued

Page(s)

Green Tree Fin. Corp. v. *Bazzle*,
539 U.S. 444 (2003) ..... I, 2, 7, 10

Iberia Credit Bureau, Inc. v. *Cingular Wireless LLC*,
379 F.3d 159 (5th Cir. 2004) 12

Inv. Partners, L.P. v. *Glamour Shots Licensing, Inc.*,
298 F.3d 314 (5th Cir. 2002) 11, 12

Jenkins v. *First Am. Cash Advance of Ga., LLC*, __ F.3d __, 2005 WL 388269
(11th Cir. Feb. 18, 2005) 12

Johnson v. *W. Suburban Bank*, 225 F.3d 366
(3d Cir. 2000) 13

Livingston v. *Assocs. Fin., Inc.*,
339 F.3d 553 (7th Cir. 2003) 12, 13

Long v. *Silver*, 248 F.3d 309 (4th Cir. 2001) 12

Mastrobuono v. *Shearson Lehman Hutton, Inc.*,
514 U.S. 52 (1995) 6

Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) 6, 9

Moses H. Cone Mem'l Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983) 3, 4, 6, 7

PacifiCare Health Sys., Inc. v. *Book*,
538 U.S. 401 (2003) ..... I, 2

Powertel, Inc. v. *Bexley*, 743 So. 2d 570
(Fla. 1st DCA 1999) 12

Raytheon Co. v. *Automated Bus. Sys., Inc.*,
882 F.2d 6 (1st Cir. 1989) 12

TABLE OF AUTHORITIES – continued

Page(s)

Saturn Distrib. Corp. v. *Williams*, 905 F.2d 719 (4th Cir. 1990) 7

Sawtelle v. *Waddell & Reed, Inc.*, 754 N.Y.S.2d 264 (App. Div. 2003) 10, 11

Shelley v. *Kraemer*, 334 U.S. 1 (1948) 11

Snowden v. *Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002) 13

State ex rel. Dunlap v. *Berger*, 567 S.E.2d 265 (W. Va. 2002) 12

State Farm Mut. Auto. Ins. Co. v. *Campbell*, 538 U.S. 408 (2003) 3, 8, 9, 11

Szetela v. *Discover Bank*, 97 Cal. App. 4th 1094 (2002) 12

Ting v. *AT&T*, 319 F.3d 1126 (9th Cir. 2003) 12, 13

United States v. *Locke*, 529 U.S. 89 (2000) 13

Volt Info. Scis., Inc. v. *Board of Trustees of the Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989) 5, 6

Statutes and Rules

Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-15 ..... *passim*

Y2K Act of 1999, Pub. L. No. 106-37 § 2(a)(3), 113 Stat. 186 5

S. Ct. R. 37.2(b) I

S. Ct. R. 37.6 1

TABLE OF AUTHORITIES – continued

Page(s)

Miscellaneous

3 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 42.4(c)(2) (Robert L. Haig ed. 1998) 4

Roger S. Haydock, *Civil Justice and Dispute Resolution in the Twenty-First Century: Mediation and Arbitration Now and for the Future*, 27 WM. MITCHELL L. REV. 745 (2000) 6

H.R. REP. NO. 97-542 (1982) 5

Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary, 68th Cong., 1st Sess. (1924)..... 9

Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998) 5, 6

Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577 (1997) 11

Dan Schechter, *Arbitrator's $6 Million Punitive Damage Award Against Lender Is Upheld, Despite 3000-to-1 Ratio; Punitive Damage Waiver Invalid Under State Law*, COMM. FIN. NEWSLETTER, Sept. 13, 2004, at 64 ..... 10, 13

S. REP. NO. 68-536 (1924)..... 4

Gary Tidwell, *et al.*, *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations* (Aug. 5, 1999) 6

TABLE OF AUTHORITIES – continued

Page(s)

Tr. of Oral Argument, *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444 (No. 02-634) (Apr. 22, 2003) 7, 10

Neil Vidmar, *Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data from Medical Malpractice*, 43 EMORY L.J. 885 (1994) 9

Jack Wilson, *"No-Class-Action Arbitration Clauses," State-Law Unconscionability, And the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUIN. L. REV. 737 (2004) 13

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE AMERICAN FINANCIAL SERVICES ASSOCIATION, THE CONSUMER MORTGAGE COALITION, AND THE FINANCIAL SERVICES ROUNDTABLE'S HOUSING POLICY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Chamber of Commerce of the United States, the American Financial Services Association, the Consumer Mortgage Coalition, and the Financial Services Roundtable's Housing Policy Council submit this brief as *amici curiae* in support of the petition for a writ of certiorari filed by EMC Mortgage Corporation.[1]

INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of all sizes. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases that have raised issues of vital concern to the nation's business community. In particular, the Chamber has been involved in a wide variety of cases involving the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-15, and has re-

---

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this case authored this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

peatedly appeared as an *amicus* in this Court in such cases—most recently in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), and *PacifiCare Health Systems, Inc.* v. *Book*, 538 U.S. 401 (2003). The Chamber was one of a number of groups that filed a joint *amicus* brief in the Eighth Circuit in this case, urging that court to grant rehearing.

The American Financial Services Association ("AFSA") is the national trade association for market-funded providers of financial services to consumers and small businesses. AFSA's membership includes over 500 diversified financial-services companies that offer an array of financial services, including personal, automobile, and home-equity loans and credit cards. AFSA joined the *amicus* brief in the Eighth Circuit in this case.

The Consumer Mortgage Coalition ("CMC") is a trade association of national mortgage lenders, mortgage servicers, and mortgage origination-service providers, committed to the nationwide rationalization of consumer mortgage laws and regulations. CMC, too, joined the *amicus* brief in the court below.

The Housing Policy Council ("HPC") is an operating division of the Financial Services Roundtable, whose membership originates well over half of the residential mortgages in the United States. It represents its membership in all matters relating to home mortgages in regulatory, legislative, and judicial fora, and also joined the *amicus* brief in the court below.

Many of the members, constituent organizations, and affiliates of the *amici* have adopted as standard features of their business contracts provisions that in appropriate circumstances mandate the arbitration of disputes arising from or relating to those contracts. They use arbitration because it is a prompt, fair, inexpensive, and effective method of resolving disputes with consumers and other contracting parties. By adopting an entirely implausible interpretation of an arbitra-

tion agreement and then refusing to review a massive award of punitive damages for consistency with due process, the Eighth Circuit's decision significantly undermines the benefits of arbitration. Were that decision to stand, it could easily prove to be a poison pill that causes the *amici*'s members to give up on arbitration altogether. Because such an outcome is in no one's interest and flies directly in the face of the policies animating the FAA, *amici* have a strong interest in the issues presented in the petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The "liberal federal policy favoring arbitration agreements" (*EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 288-289 (2002) (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)) would be entirely undermined by a rule that causes parties to stop including arbitration provisions in their contracts. But that is precisely what might happen were the Eighth Circuit's decision to stand.

As petitioner has explained, there are two distinct flaws in the court of appeals' decision: the lower court went far out of its way to interpret the parties' arbitration agreement and Missouri law to allow the arbitrator to award punitive damages at all, and then compounded that error by erroneously holding that the amount of punitive damages awarded by an arbitrator is not subject to review for excessiveness under the standards set forth in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), and *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996).

Petitioner has demonstrated that each of these issues independently warrants this Court's attention, and the combination of the two renders further review particularly important. Review is also imperative for another reason: the court of appeals' decision—and in particular its refusal to subject the size of an arbitrator's punitive-damages award to careful scrutiny—could prove to be a poison pill that will lead many

companies to stop including arbitration provisions in their contracts. Given the real benefits that arbitration provides to businesses, consumers and the court system, and the attendant strong federal policy favoring arbitration, that result would be a travesty. Thus, this Court should grant certiorari and reverse the decision below.

ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER COURTS MUST ENSURE THAT ANY AWARD OF PUNITIVE DAMAGES BY AN ARBITRATOR COMPORTS WITH DUE PROCESS.

A. Federal Policy Encourages Contracting Parties To Agree To Mandatory Arbitration Clauses.

1. Arbitration is a process in which "one or more third-party neutrals review facts and arguments from both sides during an adversarial hearing, apply legal standards, and render a decision on the merits." 3 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 42.4(c)(2) (Robert L. Haig ed. 1998). This alternative to traditional litigation for resolving disputes has long received the law's endorsement. In particular, the FAA, enacted in 1925, established "a liberal federal policy favoring arbitration agreements." *Moses H. Cone*, 460 U.S. at 24-25.

In enacting the FAA, Congress believed that by eliminating the delay and expense of litigation, arbitration would "appeal to big business and little business alike, * * * corporate interests [and] individuals." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995) (quoting S. REP. NO. 68-536, at 3 (1924)). To that end, the FAA requires "courts to enforce arbitration agreements into which parties had entered and to place such agreements upon the same footing as other contracts." *Id.* at 271 (internal quotation marks, alterations and citations omitted).

2. There are many reasons why parties to a contract might agree to arbitrate disputes arising from their business relationship rather than proceed to court. Arbitration "'is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearing and discovery devices.'" *Allied-Bruce*, 513 U.S. at 280 (quoting H.R. REP. NO. 97-542, at 13 (1982)). These advantages are particularly "helpful to individuals * * * who need a less expensive alternative to litigation." *Ibid.* In fact, a recent study that compared employment claims filed with the American Arbitration Association with similar claims filed in federal court determined that, on average, the cases that went to arbitration were resolved in half the time that it took to resolve cases that were litigated in court. See Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 55 (1998). It is therefore not surprising that Congress recently reaffirmed its view that arbitration helps avoid the "delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation." Y2K Act of 1999, Pub. L. No. 106-37 § 2(a)(3)(B)(iv), 113 Stat. 186.

Arbitration agreements possess the particular benefit of allowing the contracting parties to select the dispute-resolution procedures and remedies that are most appropriate to their circumstances, including the nature of the contract and the types of disputes likely to arise under it. This Court has recognized that "[a]rbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt Info. Scis., Inc.* v. *Board of Trustees of the Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989); see also *ibid.* (the parties may "specify by contract the rules under which * * * arbitration may be conducted").

There is little, if any, downside to arbitration to offset its numerous advantages. Importantly, there is no evidence that the additional speed and flexibility of arbitration is achieved at the cost of the procedural fairness associated with traditional litigation. This Court has "decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985). Nor does arbitration disproportionately benefit large corporate entities at the expense of individuals. To the contrary, a recent study determined that individuals are four times *more* likely to prevail in arbitration than in litigation. See Maltby, 30 COLUM. HUM. RTS. L. REV. at 46-48. And, win or lose, the vast majority of those participating in arbitration are satisfied with the process. A study of securities arbitration, for example, indicated that over 90 percent of the participants believed that their cases were handled fairly. See Gary Tidwell, *et al.*, *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations*, at 25 (Aug. 5, 1999) (presented to the National Meeting of the Academy of Legal Studies in Business). Consumers in particular prefer arbitration over litigation by wide margins. Roger S. Haydock, *Civil Justice and Dispute Resolution in the Twenty-First Century: Mediation and Arbitration Now and for the Future*, 27 WM. MITCHELL L. REV. 745, 758 (2000).

3. It is well established that, "when a court interprets * * * provisions in an agreement covered by the FAA, 'due regard must be given to the federal policy favoring arbitration.'" *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (quoting *Volt*, 489 U.S. at 476). This "policy favoring arbitration" means, of course, that "any doubts concerning the *scope* of arbitrable issues should be resolved in favor of arbitration." *Id.* at 62 n.8 (quoting *Moses H. Cone*,

460 U.S. at 24-25) (emphasis added). But that is only part of what this pro-arbitration policy implies.

For example, because of this federal policy favoring arbitration, state laws that discourage or interfere with arbitration are preempted by federal law. See, *e.g.*, *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 688 (1996) ("The goals and policies of the FAA * * * are antithetical to threshold limitations placed specifically and solely on arbitration provisions.") (quotation marks omitted). As Justice Scalia rhetorically asked during the oral argument in *Bazzle*:

> Why isn't the Federal Arbitration Act more reasonably interpreted as directed at those State laws that * * * are destructive of arbitration, that * * * are hostile not in the sense of any * * * mental intent, but that in their operation make it difficult for parties to enter into arbitration agreements?

Tr. of Oral Argument, *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444 (No. 02-634), at 53 (Apr. 22, 2003). See also, *e.g.*, *Saturn Distrib. Corp.* v. *Williams*, 905 F.2d 719, 723 (4th Cir. 1990) ("The FAA does not allow a state * * * to circumvent Congressional intent by enacting special rules to discourage or prohibit the formation of agreements to arbitrate.").

Similarly, this federal policy means that courts must not go out of their way to interpret contracts in a fashion that will deter parties from including arbitration provisions in their contracts in the future. See, *e.g.*, *Waffle House*, 534 U.S. at 310 (Thomas, J., dissenting) (a "result [that] discourages the use of arbitration agreements [is] completely inconsistent with the policies underlying the FAA").

Finally, this animating principle necessarily means that, if possible, the FAA *itself* must be interpreted not to discourage arbitration. Cf. *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979 ("in all cases of statutory construc-

tion, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve"). An interpretation of the FAA—or of state law—that leads people to stop agreeing to arbitrate disputes in the future cannot possibly be said to be pro-arbitration.

However, as we discuss below, that is precisely what may happen as a result of the decision of the court of appeals in this case.

B. The Decision Below Is Effectively A Poison Pill That Will Lead Contracting Parties Not To Include Arbitration Clauses In Their Contracts In The Future.

1. The court of appeals refused to subject a $6 million punitive award that is 3,000 times the plaintiffs' compensatory damages to more than the most minimal scrutiny. Instead, the court held that the arbitrator had not "manifest[ly] disregard[ed]" the law (Pet. App. 13a) even though he (i) awarded an amount of punitive damages far beyond that which any court could plausibly have awarded consistent with due process (see Pet. 21-22), and in so doing (ii) relied on the net worth of the defendant despite this Court's explicit admonition that a defendant's wealth cannot be used to justify an otherwise-excessive award of punitive damages (see *State Farm*, 538 U.S. at 427).

As the petitioner has explained, courts have reached a wide variety of conclusions as to whether arbitral awards of punitive damages are subject to judicial scrutiny at all, and if so the level of scrutiny to which they must be subjected. See Pet. 23-25. This chaos in the lower courts cries out for Supreme Court review. But further review is all the more important because the *effect* of rulings like the decision below will be to deter parties from agreeing to arbitration in the first place.

Everyone understands that arbitration involves trade-offs, with the parties accepting truncated procedures in exchange for the "'simplicity, informality, and expedition'" that characterize arbitration. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi*, 473 U.S. at 628); see also, *e.g.*, *Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 1st Sess., at 7 (1924) (statement of Charles Bernheimer, N.Y. Chamber of Commerce) ("arbitration saves time, saves trouble, saves money."). As part of this trade-off, it is a commonplace that "courts accord an extraordinary level of deference" to arbitral awards, even if an award may "rest[] on errors of fact or on a misinterpretation of the contract." Pet. App. 5a (internal quotation marks and citations omitted).

At the same time, if safeguards do not exist against crushing amounts of punitive damages being added at will to arbitral awards, the careful calculus that makes arbitration an attractive alternative to litigation will be undermined. To "ensur[e] that an award of punitive damages [by a court] is based upon an 'application of law, rather than a decisionmaker's caprice,'" this Court has mandated that any such award be subjected to "[e]xacting appellate review." *State Farm*, 538 U.S. at 418 (quoting *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001)). But nothing suggests that arbitrators will award smaller amounts of punitive damages than juries. See Neil Vidmar, *Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data from Medical Malpractice*, 43 EMORY L.J. 885, 907 (1994) (data does not support the hypothesis that juries award larger punitive awards than arbitrators). Thus, if an arbitrator's award of punitive damages is subject to no review (or to only extremely limited review) by a confirming court, contracting parties may well decide that the risk of a massive punitive award

being assessed against them outweighs the possible benefits of arbitration.[2]

In fact, in light of the court of appeal's decision in this very case, one commentator has suggested that businesses drafting contracts "think twice about arbitration agreements." Dan Schechter, *Arbitrator's $6 Million Punitive Damage Award Against Lender Is Upheld, Despite 3000-to-1 Ratio; Punitive Damage Waiver Invalid Under State Law*, COMM. FIN. NEWSLETTER, Sept. 13, 2004, at 64. During the oral argument in *Bazzle*, Justice Souter noted the same concern—there, over the effect of a more-or-less unreviewable decision by an arbitrator to certify a class in an arbitration—by questioning whether, "[w]ithout judicial review, [a party to a contract] would * * * have rolled the dice for $27 million on one arbitrator." *See* Tr. of Oral Argument, *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444 (No. 02-634), at 47 (Apr. 22, 2003).

2. Of course, if the FAA really *did* mandate that the amount of an award of punitive damages is essentially unreviewable in court, this Court could do nothing about it even though that rule could prove to be the death-knell for contractual arbitration clauses.[3] But the lower court was wrong in so holding, for at least two distinct reasons.

First, an excessive award of punitive damages necessarily evinces a "manifest disregard of the law." See, *e.g.*, *Sawtelle* v. *Waddell & Reed, Inc.*, 754 N.Y.S.2d 264, 269-270 (App. Div. 2003) (vacating arbitrator's award of punitive damages

---

[2] Of course, under an arbitration agreement that allows the arbitrator to award punitive damages, such damages could be awarded to either party—but most businesses will find little comfort from that, as the concern about an astronomic award *against* the company will far outweigh any possibility of recovering a large award of punitive damages.

[3] Because of the negative effects of such a conclusion, that determination should in any event come only from this Court.

as excessive); *Birmingham News Co.* v. *Horn*, __ So.2d __, 2004 WL 1293993, at *39 (Ala. June 11, 2004) (reviewing arbitrator's award of punitive damages for compliance with *State Farm* under "manifest disregard" standard); cf. *Cole* v. *Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1486-1487 (D.C. Cir. 1997).

Second, although a number of courts have held that the due process clause does not apply to punitive damages awarded by an arbitrator,[4] that conclusion is legally unsupportable. It is the *confirming court itself* that is denying the respondent its right to due process by confirming an excessive award of punitive damages. See, *e.g.*, Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 619-629 (1997); cf. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948) (court enforcement of a private racial covenant is state action and violates the Equal Protection Clause).

For both of these reasons, the court of appeals plainly erred, and this Court should grant certiorari and reverse.

3. The court of appeals also held that Missouri law explicitly forbids parties from contractually agreeing to waive the right to collect punitive damages for intentional torts. See Pet. App. 8a. As petitioner has explained, that conclusion rests on an at-best tenuous interpretation of state law, and denies petitioner due process under *State Farm*. See Pet. 12-18.[5] Furthermore, this ruling, too, is a poison pill that may

---

[4] See, *e.g.*, *Davis* v. *Prudential Sec., Inc.*, 59 F.3d 1186, 1190-1192 (11th Cir. 1995).

[5] The overwhelming majority of the federal courts of appeals that have addressed the issue have held that "the parties can stipulate to whatever procedures they want to govern the arbitration of their disputes * * * [and] surely can stipulate that punitive damages will not be awarded." *Baravati* v. *Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994). See, *e.g.*, *Inv. Partners, L.P.* v.

lead parties to choose not to agree to arbitrate (or at least not to agree to arbitrate claims arising under Missouri law).

Even standing alone, this new impediment to arbitration would warrant the Court's intervention. However, such intervention is all the more needed because the decision below is just one of a number of recent lower-court cases that have had the effect of substantially reducing the attractiveness of arbitration on the basis of at-best arguable interpretations of state law.

The specific issues in these cases have varied. For example, several courts have held that it is unconscionable under state law for the parties to an arbitration agreement to agree to waive the ability to proceed on a class-wide basis. See, *e.g.*, *Ting* v. *AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003); *Szetela* v. *Discover Bank*, 97 Cal. App. 4th 1094 (2002); *State ex rel. Dunlap* v. *Berger*, 567 S.E.2d 265 (W. Va. 2002); *Powertel, Inc.* v. *Bexley*, 743 So. 2d 570 (Fla. 1st DCA 1999).[6] Other courts have found confidentiality provi-

---

Glamour Shots Licensing, Inc., 298 F.3d 314, 318 (5th Cir. 2002); *Long* v. *Silver*, 248 F.3d 309, 319 (4th Cir. 2001); *Bowen* v. *Amoco Pipeline Co.*, 254 F.3d 925, 939-940 (10th Cir. 2001); *Davis*, 59 F.3d at 1189; *Raytheon Co.* v. *Automated Bus. Sys., Inc.*, 882 F.2d 6, 12 (1st Cir. 1989).

However, given the principle of *contra proferentum*—on which the court of appeals relied in the alternative to hold that punitive damages were available in this case (see Pet. App. 9a-11a)—it is imperative that this Court hold that any punitive-damages award by an arbitrator must be reviewable for excessiveness.

[6] By contrast, every federal court of appeals that has addressed the issue, except for the Ninth Circuit, has held that there is nothing unconscionable about a class-action waiver in an arbitration agreement. See, *e.g.*, *Jenkins* v. *First Am. Cash Advance of Ga., LLC*, __ F.3d __, 2005 WL 388269, at *8 (11th Cir. Feb. 18, 2005); *Iberia Credit Bureau, Inc.* v. *Cingular Wireless LLC*, 379 F.3d 159, 174-175 (5th Cir. 2004); *Livingston* v. *Assocs. Fin., Inc.*,

sions in arbitration clauses to be unconscionable under state law (see, *e.g.*, *Ting*, 319 F.3d at 1151-1152), or have questioned limits placed on discovery in arbitration (see, *e.g.*, *Armendariz* v. *Foundation Health PsychCare Servs., Inc.*, 24 Cal. 4th 83, 104-105 (2000)).

The unifying theme of these cases—including the Eighth Circuit's holding that Missouri law precludes parties from waiving punitive damages in an arbitration agreement—is that each conditions the right to enforce an arbitration agreement on the acceptance of procedures and/or remedies that directly conflict with the animating principles of the FAA. In their zeal to superimpose the procedures of litigation onto arbitration, these courts have created a Frankenstein's monster that "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress" in the enactment of the FAA and therefore is preempted under the Supremacy Clause. *United States* v. *Locke*, 529 U.S. 89, 109 (2000) (internal quotation marks and citation omitted).

Individually and together, these deeply flawed decisions threaten to induce businesses to stop including arbitration provisions in their contracts. See, *e.g.*, Jack Wilson, *"No-Class-Action Arbitration Clauses," State-Law Unconscionability, And the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUIN. L. REV. 737, 778 (2004) (state-law rule precluding class-action waivers may lead "firms [to] conclude that the known, class litigation, is preferable to unknown, class arbitration. Class arbitration just seems to present too many risks."); Schechter, *supra*, COMM. FIN. NEWSLETTER, Sept. 13, 2004, at 64. The Court should grant certiorari to reverse the lower court's inappropriate reliance on state law and to clarify that the FAA

---

339 F.3d 553, 559 (7th Cir. 2003); *Snowden* v. *Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Johnson* v. *W. Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000); but see *Ting*, 319 F.3d at 1150.

preempts state-law rules that undermine the desirability of arbitration.

* * * * *

In sum, if states can mandate that arbitrators be allowed to award punitive damages, and courts thereafter cannot review the amount of any punitive award by an arbitrator for compliance with due process, parties are likely to stop including arbitration provisions in their contracts. That would entirely undermine the pro-arbitration policy of the FAA. The Court should grant certiorari to prevent the wholesale vitiation of the FAA that the Eighth Circuit's ruling threatens to effect.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBIN S. CONRAD
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

EVAN M. TAGER
DAVID M. GOSSETT
Counsel of Record
ARCHIS A. PARASHARAMI
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for the Amici Curiae

MARCH 2005